

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANFORD R. WHEELER)	
Claimant)	
VS.)	
)	Docket No. 187,565
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
KEMPER INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the Review and Modification Award entered by Administrative Law Judge John D. Clark and filed in the Division of Workers Compensation on January 23, 1997.

APPEARANCES

Claimant appeared by and through his attorney, Robert R. Lee of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Marvin R. Appling of Wichita, Kansas.

RECORD

The Appeals Board considered the transcript of the January 23, 1997, motion hearing held on respondent's Application for Review and Modification. The Appeals Board also considered the case file of the Division of Workers Compensation.

STIPULATIONS

The parties stipulated claimant returned to work for the respondent at a comparable wage on October 31, 1996.

ISSUES

Claimant requested the Appeals Board to review the issue of the amount of compensation due claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

The original Award in this case was entered by Administrative Law Judge John D. Clark on January 2, 1996. The Administrative Law Judge found claimant suffered a work-related low back injury while employed by the respondent on February 27, 1994. As a result of that injury, the Administrative Law Judge found claimant had a 10.5 percent permanent partial functional impairment to the body as a whole. He further found that claimant was entitled to permanent partial general disability benefits based on the "new act" work disability test contained in K.S.A. 44-510e(a). At the time of the regular hearing, respondent had laid claimant off of work and had not otherwise offered him employment within his work restrictions. Therefore, based on the opinion of Dr. Ernest R. Schlachter that claimant had a 72 percent loss of work tasks performing ability and averaged with a 100 percent wage loss, the Administrative Law Judge found claimant was entitled to a work disability of 86 percent. Respondent appealed that Award to the Appeals Board. In an order dated April 26, 1996, the Appeals Board affirmed the Administrative Law Judge. Respondent subsequently appealed the Appeals Board Order to the Kansas Court of Appeals and that appeal is pending a decision at this time.

On November 6, 1996, the respondent filed an Application for Review and Modification pursuant to K.S.A. 44-528. Respondent contended that the claimant had returned to work for the respondent earning a comparable wage and thus the present Award was excessive. A hearing was held on January 23, 1997, and at the hearing the parties stipulated that claimant had returned to work for the respondent at a comparable wage on October 31, 1996.

Following that hearing, the Administrative Law Judge entered the Review and Modification Award which is the subject of this appeal. The Administrative Law Judge found claimant was no longer entitled to a work disability in excess of his permanent functional impairment, as he was engaging in work for wages equal to 90 percent or more of his preinjury wage. See K.S.A. 44-510e(a). However, the Review and Modification Award cites the presumption contained in the "old act" in error as the claimant's date of accident was stipulated in the original Award as occurring on February 27, 1994. Accordingly, the Administrative Law Judge found claimant's permanent partial general disability benefits

should be calculated from October 31, 1996, the date claimant returned to work, at the 10.5 percent permanent functional impairment instead of the 86 percent work disability.

Before K.S.A. 44-510e(a) was amended in 1993, an award of permanent partial disability benefits was determined by first finding the weekly compensation rate by multiplying the permanent partial disability percentage times claimant's average gross weekly wage and then by multiplying the result by 66 $\frac{2}{3}$ percent. The weekly compensation rate was then subject to the state maximum weekly rate and paid for a period not to exceed 415 weeks from date of accident. After the 1993 amendments, permanent partial disability benefits are calculated by multiplying the number of disability weeks by the permanent partial disability percentage and those weeks are paid at 66 $\frac{2}{3}$ percent of claimant's average gross weekly wage subject to the state maximum weekly rate. In the instant case, the Administrative Law Judge found that as of October 30, 1996, claimant had been paid 24.5 weeks of temporary total disability compensation at the maximum rate of \$313.00 per week followed by 115.14 weeks of permanent partial disability compensation at the maximum rate of \$313.00 for the 86 percent work disability. The claimant is now only entitled to permanent partial disability benefits based on the 10.5 percent permanent functional impairment rating or 42.58 weeks of permanent partial disability benefits. The Administrative Law Judge found that the 42.58 weeks of benefits had been previously paid because the 115.14 weeks of permanent partial disability weeks had been paid prior to claimant returning to work. The Administrative Law Judge relied on the Appeals Board decision of Romeo v. Smith Temporary Services, Docket No. 184,711 (December 1995). In Romeo, the claimant was entitled to a work disability of 79 percent for a period of 21.14 weeks and then was returned to work by the respondent at a job earning a comparable wage. Claimant's date of accident was November 10, 1993, and therefore, the "new act" provisions of K.S.A. 44-510e(a) were utilized in the calculation of the award. The Appeals Board found that when there is a change in the disability rate the respondent is entitled to a credit for the permanent partial disability benefits previously paid. The latest disability rate, or amounts already paid, if higher, become the ceiling for the benefits awarded.

Claimant argues he should be entitled to an additional payment of 30.48 weeks of permanent partial disability compensation following his return to work. Claimant contends respondent should be credited with the number of temporary total weeks less the first 15 weeks as provided for in the "new act" which in this case would be 9.5 weeks plus the 115.14 weeks of permanent partial disability weeks previously paid for a 115.14 weekly total credit of 124.64 weeks. This credit should then be subtracted from the statutory maximum of 415 permanent partial disability weeks available leaving 290.36 weeks remaining to be paid. Claimant's functional impairment of 10.5 percent should then be multiplied times the 290.36 weeks remaining to be paid resulting in an additional payment to the claimant of 30.48 weeks. The claimant argues that by following the calculation method set forth in Romeo, the claimant has no incentive to return to work for a comparable wage knowing he will have to give up thousands of dollars of benefits. It is claimant's position that his proposed method of calculating an award of permanent partial disability benefits when a claimant returns to work for a respondent at a comparable wage, gives the claimant an incentive to return to work.

The Appeals Board disagrees with the claimant's arguments and thus affirms the Administrative Law Judge's method of calculating permanent partial disability benefits in the Review and Modification Award based on the method the Appeals Board utilized in Romeo. The Appeals Board concludes that the legislature made a policy decision in 1993 to pay a workers compensation award at a larger weekly amount over a shorter period of time. Therefore, when the disability rate changes from a higher rate to a lower rate, claimant in some instances, depending on the number of weeks claimant had received at the higher rate, has already been compensated for the lower disability award. Credit must be given for the previous number of weeks paid at the higher disability rate or the claimant would potentially receive permanent partial disability benefits that exceed the benefits required to be paid by statute.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award entered by Administrative Law Judge John D. Clark filed January 23, 1997, should be, and is hereby, affirmed.

All other orders contained in the Review and Modification Award and the Appeals Board Order dated April 26, 1996, that are not inconsistent with this Order are herein adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Frederick L. Haag, Wichita, KS
Marvin R. Appling, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director